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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 604

VAN A. STILLEY, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Byron N. Scott, attorney for Van A. Stilley, Esq., petitioner herein, respectfully requests in his behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Claims in the above entitled case.

ORDER DELIVERED IN THE COURT BELOW TO BE REVIEWED

The order without opinion to be reviewed was delivered in the United States Court of Claims, No. 419-66, decided April 5, 1968, and is set out *infra* in the Appendix A hereto at page 9. Petitioner's motion for reconsideration of that order was denied on July 17, 1968.

JURISDICTION

As grounds on which to invoke jurisdiction of this Court, petitioner relies upon Title 28, U. S. Code, Section 1255, and alleges and verily believes that the special and important reason justifying a grant of review on writ of certiorari in the sound judicial discretion of this Court within the meaning of Rule 19 of the Rules of this Court is that the order of the court below decides an important question of federal law which has not been, but should be settled by this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Whether to discharge a probationary federal employee, who is an attorney, for alleged falsification of answers on a pre-employment questionnaire, without a hearing and in violation of agency rules, while misrepresenting and concealing evidence which would have sustained his denial of the charge, stamps him with such a "stigma" as to be a denial of his Constitutional right to due process.

2. Whether a U. S. District Court's dismissal of a complaint for lack of jurisdiction thereby collaterally estops the plaintiff therein to bring an action on the same facts in the U. S. Court of Claims.

CONSTITUTIONAL PROVISION INVOLVED

Amendment 5

> "No person shall be . . . deprived of life, liberty or property without due process of law . . ."

REGULATIONS INVOLVED

The Rules of Conduct for Internal Revenue Service Employees provide as follows:

> § 1942.55, Rules of Conduct for Internal Revenue Service Employees. (effective January 1, 1963)

False Statements

Proper functioning of the Revenue Service requires that the Service, the Courts, other Federal agencies and the public be able to rely implicitly on the truthfulness of Revenue Service employees in matters of official interest. An employee may be subjected to severe disciplinary action and prosecution for intentionally making false or misleading verbal or written statements in matters of official interest. Some of these matters of official interest are: transactions with taxpayers, other Federal agencies or fellow employees; entries on tax returns, work reports of any nature or accounts of any kind; vouchers, leave requests, application forms SF-57, and other forms which serve as a basis for appointment, reassignment, promotion, or other personnel actions; and affidavits, transcripts of testimony, or statements to Inspection, whether or not under oath.

CIVIL SERVICE COMMISSION REGULATIONS

5 CFR 315.804 *Termination of probationers for unsatisfactory performance or conduct.*

When an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct.

5 CFR 315.805 *Termination of probationers for conditions arising before appointment.*

When an agency proposes to terminate an employee serving a probationary or trial period for reasons based in whole or in part on conditions aris-

ing before his appointment, the employee is entitled to the following:

(a) *Notice of proposed adverse action.*

The employee is entitled to an advance written notice stating the reasons, specifically and in detail, for the proposed action.

(b) *Employee's answer.* The employee is entitled to a reasonable time for filing a written answer to the notice of proposed adverse action and for furnishing affidavits in support of his answer. If the employee answers, the agency shall consider the answer in reaching its decision.

(c) *Notice of adverse decision.* The employee is entitled to be notified of the agency's decision at the earliest practicable date. The agency shall deliver the decision to the employee at or before the time the action will be made effective. The notice shall be in writing, inform the employee of the reasons for the action, inform the employee of his right of appeal to the appropriate office of the Commission, and inform him of the time limit within which the appeal must be submitted as provided in § 315.806(d).

5 CFR 315.806 *Appeal rights to the Commission.*

(a) *Right of appeal.* An employee is entitled to appeal to the Commission in writing from the agency's decision to terminate him under § 315.804 or § 315.805 only as provided in this section. The Commission's review does not include any matter except as provided in paragraphs (b) and (c) of this section.

(b) *On discrimination.* An employee whose termination is subject to the provisions of § 315.804 or § 315.805 may appeal on the ground that the action taken was based on political reasons not required by statute, or resulted from discrimination because of sex or marital status, or from improper discrimination because of physical handicap. When an appeal is based on any of these grounds, the appellant shall submit an affidavit setting forth the facts and circumstances on which the appeal is based.

(c) *On improper procedure.* A probationer whose termination is subject to § 315.805 may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section.

STATEMENT

On June 26, 1964, the 362nd day of his probationary year, petitioner, an attorney, was fired from his position with the Internal Revenue Service for having falsified his negative answers to two pre-employment questionnaire items concerning his mental health history. The notice of proposed separation, citing a U. S. Navy medical report, stated that petitioner had been treated for a mental condition. Petitioner denied the charge. He asked to see the report, which he had not known existed, and requested a hearing. Both requests were denied and the firing was sustained.

The medical report, in fact, reveals that petitioner was not treated for anything. It corroborates petitioner's prior explanation that he had been examined and observed by a psychiatrist while in the Navy in 1951-52, but that he was not treated, not told that he was treated, and not told that he needed treatment. Other than for that experience petitioner has never been seen professionally by any psychiatrist. His questionnaire answers were and are true, and he neither misled nor intended to mislead anyone. He is now a member of the Bar of this Court, practicing law to the extent this disgrace permits.

The IRS misrepresented and concealed the medical report from petitioner and misrepresented and concealed both the medical report and the questionnaire forms from the Civil Service Commission when petitioner appealed there. The IRS sent its "file" of the case to the CSC, where both its regional office and later its Board of Appeals and Review considered the matter and acted adversely to petitioner without ever having seen the documents on which the charge was based, without petitioner's knowing or being able to

find out that the documents had been misrepresented and were being concealed, and without questioning the absence from the file of the documents most basic to the charge.

The medical report finally was brought to light through the efforts of petitioner's Congressman. Petitioner had already appealed to the CSC Board of Appeals and Review, mistakenly assuming that it had and would consider the documents on which the charge was based and which petitioner had not been allowed to see. When that body sustained the agency action, petitioner then sought a reconsideration based upon his discovery that he had been deceived by the IRS, that the specification to the charge was erroneous in fact, misrepresented the medical report, claimed support by a medical report which in fact did not corroborate but refuted it, and that there had been neither a charge nor a finding of intent to falsify when by its own rules falsification is not misconduct unless intentional. The CSC Board of Appeals and Review declined to reopen the case.

Petitioner then brought suit in the U. S. District Court for the District of Columbia. His complaint was dismissed on countermotions for summary judgment for lack of jurisdiction beyond two points which were considered and decided: (1) Petitioner had failed to exhaust his administrative remedies, presumably for having failed to present to the CSC that which the IRS was concealing from him, and (2) the "reason . . . [was] . . . reasonable on its face." See Appendix B, page 10. The U.S. District Judge refused to admit, hear, or consider anything touching the merits of the case. His decision was affirmed without opinion by the U.S. Court of Appeals for the D.C. Circuit.

In a further effort to exhaust his administrative remedies petitioner then appealed to the Civil Service Commissioners, presenting the material previously concealed by the IRS. The Commissioners declined to reopen the case.

Then, surely having exhausted his administrative remedies and being bound by the District Court's affirmed ruling that

it did not have jurisdiction, petitioner brought an action in the U. S. Court of Claims. On April 5, 1968, that court ruled without opinion that petitioner's claim was barred by collateral estoppel, pointing out in its order that "If [petitioner] had brought his suit in the first instance before [the Court of Claims], the court would, on the showing made to [it], have determined that a trial was required before a proper disposition could be had." See Appendix A, page 9.

Petitioner's motion for a rehearing in the Court of Claims was denied on July 17, 1968. Petitioner still has never been heard on the merits in any fact-finding forum.

REASONS FOR GRANTING THE WRIT

Petitioner relies upon the reasons advanced by Mr. Justice Thurgood Marshall when, as Solicitor General of the United States, he filed a memorandum in support of the petition for certiorari in this Court in the remarkably similar case of *Sylvia Bennett v. United States,* 174 Ct. Cl. 492 (1966); *vacated and remanded,* 385 U.S. 4 (1966). That memorandum for the United States, joining forces with the petitioner in that case, is included herein at Appendix C, page 12.

Petitioner also relies upon a recognition of the failure of our due process of law that resulted in his position caught between two irreconcilable federal court findings: One court refused to hear him on the issues; the other has found that the first decided the issues. Neither court has acted with respect to the merits of the case and petitioner with the "stigma" of a lawyer fired for lying to the Treasury Department is now out of court with never an avenue of redress. This violates his constitutional right to procedural due process, and the spirit both of the Constitution and of the Federal Rules of Civil and Appellate Procedure.

CONCLUSION

Wherefore the premises considered, petitioner believes there are special and important reasons justifying grant of a writ of certiorari in his case.

Respectfully submitted,

Byron N. Scott
Attorney for Petitioner